Pau Ngie Siong & Anor v Kontiki Trading Pte Ltd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–5 OF 1999–Q

EUSOFF CHIN CHIEF JUSTICE, WAN ADNAN CJ (MALAYA) AND ABU MANSOR FCJ

29 JUNE 2000

***Contract** — Indemnity — Application of s 86 of Contracts Act 1950 — Whether s 86 apply to contract of indemnity — Contracts Act 1950 ss 77 & 86*

The issue raised in this appeal was whether s 86 of the Contracts Act 1950 is applicable to a contract of indemnity. The appellant contended that the Court of Appeal erred when it held that s 86 had no application to contract of indemnity and that the Court of Appeal in its consideration of the appellant's appeal failed to apply s 17A of the Interpretation Acts 1948 and 1967 by which Parliament had intended that in construing statutes courts should apply the purposive approach. The respondent submitted that: (i) the law to be applied was s 77 as clearly s 77 used the words 'promisor' and 'promisee' whereas s 86 differentiate itself by the use of the terms 'surety', 'principal debtor' and 'creditor'. The principle behind the excusing or freeing of the surety was because of the independent separate contract of the creditor and principal debtor without the knowledge of the surety subsequent to the date of the tripartite guarantee entered between them. For s 86 to apply there must be the three said principle players; and (ii) when the purposive approach of interpretation is employed, it becomes clear s 86 uses the words 'debtor' and whereas s 77 speaks only of 'contract of indemnity' thus, by the same token clearly ruling out the terms 'surety', 'principal debtor' and 'creditor'. Hence, the respondent further submitted that construction is too clear to admit of any ambiguity that for 'guarantee' to operate s 86 definitely requires the three parties and for 'contract of indemnity' it is sufficient if it involves only two persons or parties.

Held, dismissing the appeal:

After having heard the arguments of both counsel and perused all the documents, the court accepted and uphold the arguments of counsel for the respondent to be substantially more correct. The Court of Appeal was correct and did not fall into error in its interpretation of the provision of s 86 of the Contracts Act 1950 that it does not apply to indemnity (see p 133B–C).

[Bahasa Malaysia summary

Isu yang dibangkitkan di dalam rayuan adalah sama ada s 86 Akta Kontrak 1950 adalah terpakai kepada kontrak tanggung rugi. Perayu

menegaskan bahawa Mahkamah Rayuan silap apabila ia memutuskan bahawa s 86 tidak terpakai kepada kontrak tanggung rugi dan bahawa Mahkamah Rayuan di dalam pertimbangan rayuan perayu gagal untuk memakai s 17A Akta Tafsiran 1948 dan 1967 di mana Parlimen berniat bahawa di dalam menafsirkan statut-statut mahkamah mestilah memakai pendekatan tujuan. Responden menghujahkan bahawa: (i) undang-undang yang terpakai adalah s 77 kerana ia adalah jelas bahawa s 77 mengunakan perkataan-perkataan 'penjanji' dan 'penerima janji' sementara s 86 membezakan dengan penggunaan terma-terma 'penjamin', 'penghutang utama' dan 'pemiutang'. Prinsip di sebalik memaafkan atau melepaskan penjamin adalah kerana kontrak yang berasingan antara pemiutang dan penghutang utama tanpa pengetahuan penjamin selepas perjanjian gerenti tiga pihak yang dimasuki antara mereka. Untuk s 86 terpakai mestilah terdapat tiga pihak utama; dan (ii) apabila pendekatan tujuan penafsiran digunakan, adalah jelas bahawa s 86 menggunakan perkataan 'penghutang' sementara s 77 hanya mengatakan tentang 'kontrak tanggung rugi' dengan itu, melalui cara yang sama menidakkan sebarang kemungkinan terma-terma 'penjamin', 'penghutang utama' dan 'pemiutang'. Dengan itu, responden selanjutnya menghujahkan bahawa penafsiran adalah terlalu jelas untuk menerima sebarang ketaksaan bahawa untuk 'gerenti' berfungsi mestilah memerlukan tiga pihak dan bagi 'kontrak tanggung rugi' adalah memadai jika ia hanya melibatkan dua orang atau pihak.

Diputuskan, menolak rayuan tersebut:

Selepas mendengar hujahan-hujahan kedua-dua peguam dan selepas meneliti semua dokumen, mahkamah menerima dan mengesahkan hujahan-hujahan peguam untuk responden sebagai lebih betul secara asas. Mahkamah Rayuan adalah betul dan tidak silap di dalam penafsiran peruntukan s 86 Akta Kontrak 1950 dan bahawa ia tidak terpakai kepada tanggung rugi (lihat ms 133B-C).]

Notes

For cases on indemnity generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2493–2499.

Cases referred to

South East Asia Insurance Bhd v Nasir Ibrahim [1992] 2 MLJ 355 (refd)

Legislation referred to

Contracts Act 1950 ss 77, 86
Interpretation Acts 1948 and 1967 s 17A

Appeal from: Civil Appeal No Q–02–657 of 1996 (Court of Appeal, Kuala Lumpur)

A *V Sivaparanjothi* (*YY Sim* with him) (*Tang & Partners*) for the appellant. *Wong Ho Leng* (*Wong Ho Leng & Co*) for the respondent.

Abu Mansor FCJ (delivering judgment of the court): This appeal was argued before us in this court, sitting in Kuching on 23 February 2000. After having heard arguments from counsel both for the appellant and the B respondent, we were invited by both counsel to properly consider the important point raised in this appeal. We then reserved our decision to write our grounds. This is our judgment.

It is not disputed that the appeal only raised one short issue of law and, according to counsel for the appellant, this is the first time this issue is C before this court for decision. Hence this court granted the required leave to appeal. The short issue raised is whether s 86 of the Contracts Act 1950 ('the Act') is only applicable to guarantor and not applicable to a contract of indemnity.

It is not necessary that we state the facts of this appeal. The facts had been clearly and admirably stated in the judgment of the Court of Appeal. D In this appeal, we also proceeded on the basis that the appellant, as well as the respondent, were not disputing the terms guarantors and indemnity used in the judgment of both the High Court and Court of Appeal. It may well be stated that the contracts entered between the appellant and the respondent in the form of two letters were, in fact, not disputed to be a E contract of indemnity.

The appellant, who was defendant, in the High Court and whose appeal was dismissed by the Court of Appeal, contended before us, that the Court of Appeal committed an error of law when it held at p 23 of its judgment as follows:

F > With that we now turn to the appeal of the second and third appellants. The only point pursued before us by their counsel was that the contract between the respondent and the company had been varied without his clients' consent in consequence of which the second and third appellants were discharged from their obligation under the letters of indemnity. This argument is based on s 86 of the Contracts Act 1950 ('the Act') which G provides as follows:
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> > 'Any variance, made without the surety's consent, in the terms of contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.'

The appellant submitted that the Court of Appeal erred when it concluded H that s 86 of the Act governs only guarantees becuase it refers to the tripartite relationship of surety, creditor and principal debtor which expressions, so the Court of Appeal held subsist under a contract of guarantee. The appellant contended that the Court of Appeal erred when it held that s 86 of the Act had no application whatsoever to contract of indemnity. The appellant also contended that the Court of Appeal erred in its application of I the case *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355 which counsel said referred to the point that past consideration is no consideration.

The appellant further submitted that the Court of Appeal in its consideration of the appellant's appeal failed to apply s 17A of the Interpretation Acts 1948 and 1967 by which Parliament had intended that in construing statutes courts should apply the purposive approach. If the Court of Appeal had done so it would have come to a finding that there is no case which states that s 86 of the Act does not apply to contracts of indemnity. Counsel submitted that the decision of the Court of Appeal in that way affects the existing thousand has far reaching effect in law.

The appellant, in particular referred us to the letter of indemnity dated 7 April 1989 at p 311B of the appeal record. Counsel for the appellant contended that vide item (7) thereof, going by its terms, payment was against presentation of bill of lading which duly provided for pay on demand but according to PW 1 (see p 108B of the appeal record) 30 days credit was given for payment thus varying the terms of payment. Such variation was negligence by the holder of the indemnity and the appellant contended the promisor should be discharged. If this court was with the appellant in their submission that s 86 apply then their appeal should therefore be allowed.

The respondent, on the other hand, contended that the Court of Appeal was correct in its decision that s 86 of the Act did not apply to contracts of indemnity and that way supported the decision of the Court of Appeal. The respondent's counsel's vain attempt in his opening submission to argue that the applicable law was the Singapore law did not find favour with us as counsel did not raise the point in the Court of Appeal.

Counsel for the respondent was, however, on firmer ground when he argued strongly that when appellant's counsel submitted that s 86 of the Act apply to both contract of guarantee as well as contract of indemnity, he contended that the argument is flawed severely because he submitted it, loses sight of and in fact ignores the clear definition of s 77 of the Act which provided thus:

> 'Contract of indemnity'
>
> A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a 'contract of indemnity'.

Counsel submitted that the law to be applied is s 77 as clearly s 77 used the words 'promisor' and 'promisee' whereas s 86 of the Act differentiate itself by the use of the terms 'surety', 'principal debtor' and 'creditor'. Thus alluding to the tripartite concept spoken of in the Court of Appeal's judgment. The principle behind the excusing or freeing of the surety was because of the independent separate contract of the creditor and principal debtor without the knowledge of the surety subsequent to the date of the tripartite guarantee entered between them. For s 86 to apply there must be the three said principal players.

Counsel for the respondent further submitted that, in his reading of s 86 of the Act, it is incorrect to say that Parliament did not intend to create a tripartite situation. When the purposive approach of interpretation is employed, it becomes clear s 86 uses the words 'debtor' and whereas s 77

speaks only of 'contract of indemnity' thus, by the same token clearly ruling out, the terms 'surety', 'principal debtor' and 'creditor'. Hence respondent's counsel further submitted that construction is too clear to admit of any ambiguity that for 'guarantee' to operate s 86 definitely requires the three parties and for 'contract of indemnity' it is sufficient if it involves only two persons or parties. And as stated clearly early in this appeal, there is no dispute whatsoever and the appellant went to concede that their transactions P1 (see p 303B of the appeal record) and P7 (see p 314B of the appeal record) are indemnities.

After having heard the arguments of both counsel and perused all the documents, we accept and uphold the arguments of counsel for the respondent to be substantially more correct. In the same breath, after having considered counsel's submission and the judgment of the Court of Appeal in its entirety, we have to say that the Court of Appeal is correct and did not fall into error in its interpretation of the provision of s 86 of the Act that it does not apply to indemnity. In so answering, we dismissed the appellant's appeal with costs. We thank counsel for both for assistance to us to come to our decision.

Appeal dismissed.

Reported by Jafisah Jaafar